



FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2417

Testimony by FLRA Employees and Production of Official Records in Legal Proceedings

AGENCY: Federal Labor Relations Authority.

ACTION: Final rule.

SUMMARY: The Federal Labor Relations Authority (FLRA) amends its procedures for requesters to follow when making requests to or demands on an employee of the FLRA's three-member Authority component (Authority), the Office of the General Counsel, or the Federal Service Impasses Panel (Panel) to produce official records or provide testimony relating to official information in connection with a legal proceeding. Specifically, the amendments expand the regulation's definition of "legal proceeding" to include matters in which the FLRA is a party. The amendments additionally delegate decision-making responsibility to the heads of each of the three components, depending on where the information is located, to ensure that responses to such requests or demands are handled in an orderly, efficient, and consistent manner. The amended procedures will better protect confidential information, provide guidance to requesters and FLRA employees, and reduce the potential for both inappropriate disclosures of official information and wasteful allocation of FLRA resources.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Fred B. Jacob, Solicitor, Federal Labor Relations Authority, 1400 K Street, NW, Washington, DC 20424; (202) 218-7999; fax: (202) 343-1007; or e-mail: solmail@flra.gov.

SUPPLEMENTARY INFORMATION: The FLRA is amending 5 CFR part 2417. Before part 2417's promulgation in March 2009, 5 CFR 2411.11 prohibited FLRA employees from producing

documents or giving testimony in response to a subpoena or other request or demand in any civil proceeding without the written consent of the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate. Under the prior version of § 2411.11, any employee served with a subpoena or request or demand who was not given the requisite written consent was instructed to move to have the subpoena invalidated “on the ground that the evidence sought is privileged against disclosure by this rule.” Part 2417 eliminated the assertion of privilege and, in its place, established factors for the FLRA to evaluate when considering requests or demands for non-public FLRA information. It also placed decision-making authority exclusively with the Chairman of the FLRA or his or her designated representative.

As described above, the FLRA is amending the regulations to include requests or demands for production of documents or testimony in legal proceedings in which the FLRA is a named party. This is consistent with the FLRA’s prior regulations and other agencies’ regulations. The FLRA is also amending the regulations to vest decision-making authority over such requests or demands to the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate, or to his or her designee. The FLRA has additionally included some minor non-substantive changes to correct typographical errors and to make small stylistic adjustments for clarification.

This rule will ensure a more efficient use of the FLRA’s resources, minimize the possibility of involving the FLRA in issues unrelated to its responsibilities, and maintain the impartiality of the FLRA in matters that are in dispute between other parties. It will also continue to serve the FLRA’s interest in protecting sensitive, confidential, and privileged information and records that are generated in fulfillment of the FLRA’s statutory responsibilities.

This rule is internal and procedural rather than substantive. It does not create a right to

obtain official records or the official testimony of an FLRA employee, nor does it create any additional right or privilege not already available to the FLRA to deny any request or demand for testimony or documents. Failure to comply with the procedures set out in these regulations would be a basis for denying a request or demand submitted to the FLRA.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FLRA has determined that this regulation, as amended, will not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule change will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$ 100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The amended regulations contain no additional information collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

Public Participation

This rule is published as a final rule. It is exempt from public comment, pursuant to 5 U.S.C. 553(b)(A), as a rule of “agency organization, procedure, or practice.”

List of Subjects in 5 CFR Part 2417

Administrative practice and procedure, Government employees.

For the reasons stated in the preamble, the Federal Labor Relations Authority amends 5 CFR part 2417 as set forth below:

PART 2417—TESTIMONY BY EMPLOYEES RELATING TO OFFICIAL INFORMATION AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS

1. The authority citation for part 2417 continues to read as follows:

Authority: 5 U.S.C. 7105; 31 U.S.C. 9701; 44 U.S.C. 3101-3107.

Subpart A—General Provisions

2. Amend §2417.101 by revising paragraphs (a)(1) and (2), (b)(1), (2), (3), and (4), and (d) to read as follows:

§ 2417.101 Scope and purpose.

(a) ***

(1) The production or disclosure of official information or records by employees, members, advisors, and consultants of the Federal Labor Relations Authority’s (FLRA’s) three-Member Authority component (the Authority), the Office of the General Counsel(the General Counsel), or the Federal Service Impasses Panel (the Panel); and

(2) The testimony of current and former employees, members, advisors, and consultants of the Authority, the General Counsel, or the Panel relating to official

information, official duties, or official records, in connection with a legal proceeding on behalf of any party to a cause pending in civil federal or state litigation, including any proceeding before the FLRA or any other board, commission, or administrative agency of the United States.

(b) ***

- (1) Conserve employees' time for conducting official business;
- (2) Minimize employees' involvement in issues unrelated to the FLRA's mission;
- (3) Maintain employees' impartiality in disputes between private litigants; and
- (4) Protect sensitive, confidential information and the integrity of the FLRA's administrative and deliberative processes.

(d) This part provides guidance for the FLRA's internal operations. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

3. Amend §2417.102 by revising the introductory text and paragraphs (a), (b), (d), and (e) to read as follows:

§ 2417.102 Applicability.

This part applies to requests and demands to current and former employees, members, advisors, and consultants for factual or expert testimony relating to official information or official duties, or for production of official records or information, in civil legal proceedings. This part does not apply to:

- (a) Requests for or demands upon an employee to testify as to facts or events that are unrelated to his or her official duties, or that are unrelated to the functions of the Authority, the

General Counsel, or the Panel;

(b) Requests for or demands upon a former employee to testify as to matters in which the former employee was not directly or materially involved while at the Authority, the General Counsel, or the Panel;

(d) Congressional requests and demands for testimony, records, or information; or

(e) Requests or demands for testimony, records, or information by any Federal, state, or local agency in furtherance of an ongoing investigation of possible violations of criminal law.

4. Revise §2417.103 to read as follows:

§ 2417.103 Definitions.

The following definitions apply to this part:

Demand means an order, subpoena, or other command of a court or other competent authority for the production, disclosure, or release of records, or for the appearance and testimony of an employee in a civil legal proceeding.

Employee means:

(1)(i) Any current or former employee or member of the Authority, the General Counsel, or the Panel;

(ii) Any other individual hired through contractual agreement by or on behalf of the Authority, the General Counsel, or the Panel, or who has performed or is performing services under such an agreement for the Authority, the General Counsel, or the Panel; and

(iii) Any individual who served or is serving in any consulting or advisory capacity to the Authority, the General Counsel, or the Panel, whether formal or informal.

(2) This definition does not include former FLRA employees who agree to testify about

general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with the FLRA.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a civil legal or administrative proceeding. Legal proceeding includes all phases of litigation.

Records or official records and information means all information in the custody and control of the Authority, the General Counsel, or the Panel, relating to information in the custody and control thereof, or acquired by an employee while in the performance of his or her official duties or because of his or her official status, while the individual was employed by or on behalf of the Authority, the General Counsel, or the Panel.

Request means any request, by whatever method, for the production of records and information or for testimony that has not been ordered by a court or other competent authority.

Requester means anyone who makes a request or demand under this part upon the FLRA.

Testimony means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

5. Revise the heading for subpart B to read as follows:

Subpart B—Requests or Demands for Testimony and Production of Documents

6. Revise §2417.201 to read as follows:

§ 2417.201 General prohibition and designation of the appropriate decision-maker.

(a) *General prohibition.* No employee or former employee of the Authority, the General Counsel, or the Panel may produce official records and information or provide any testimony relating to official information in response to a request or demand without the prior, written

approval of the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate.

(b) *Appropriate decision-maker.* (1) The Chairman of the FLRA, or his or her designee, determines whether to grant approval if the record requested or demanded is maintained by the FLRA's Authority component, or the person who is the subject of the request or demand is subject to the supervision or control of the FLRA's Authority component or was subject to such supervision or control when formerly employed at the FLRA.

(2) The General Counsel, or his or her designee, determines whether to grant approval if the record requested or demanded is maintained by the General Counsel, or the person who is the subject of the request or demand is subject to the supervision or control of the General Counsel or was subject to such supervision or control when formerly employed at the FLRA.

(3) The Chairman of the Panel, or his or her designee, determines whether to grant approval if the record requested or demanded is maintained by the Panel, or the person who is the subject of the request or demand is subject to the supervision or control of the Panel or was subject to such supervision or control when formerly employed at the FLRA.

7. Amend §2417.202 by revising the section heading, introductory text, and paragraphs (f), (h), (i), (m), (n), and (o) to read as follows:

§ 2417.202 Factors that the decision-maker will consider.

The Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a request or demand. Among the relevant factors that the Chairman of the FLRA, the General

Counsel, or the Chairman of the Panel may consider in making this decision are whether:

(f) The request or demand is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the request or demand arose;

(h) Disclosure would reveal confidential, sensitive, or privileged information; trade secrets or similar, confidential or financial information; otherwise protected information; or information that would otherwise be inappropriate for release;

(i) Disclosure would impede or interfere with an ongoing law-enforcement investigation or proceeding, or compromise constitutional rights or national-security interests;

(m) The request or demand is within the authority of the party making it;

(n) The request or demand is sufficiently specific to be answered; and

(o) Any other factor deemed relevant under the circumstances of the particular request or demand.

8. Amend §2417.203 by revising the introductory text and paragraphs (a), (b) introductory text, (b)(4), (5), (6), (7), and (9), (c), (d), (e), and (f) to read as follows:

§ 2417.203 Filing requirements for litigants seeking documents or testimony.

A requester must comply with the following requirements when filing a request or demand for official records and information or testimony under part 2417. Requesters should file a request before a demand.

(a) The request or demand must be in writing and must be submitted to the FLRA's Office

of the Solicitor.

(b) The written request or demand must contain the following information:

(4) A statement as to how the need for the information outweighs any need to maintain the confidentiality of the information and the burden on the FLRA to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than an employee, such as a retained expert;

(6) If testimony is sought, the intended use of the testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(9) An estimate of the amount of time that the requester and other parties will require for each employee to prepare for testimony, to travel to the legal proceeding, and to attend the legal proceeding.

(c) The Office of the Solicitor reserves the right to require additional information to complete the request, where appropriate.

(d) Requesters should submit their request or demand at least 30 days before the date that records or testimony are required. Requests or demands submitted fewer than 30 days before records or testimony are required must be accompanied by a written explanation stating the reasons for the late request or demand and the reasons that would justify expedited processing.

(e) Failure to cooperate in good faith to enable the FLRA to make an informed decision may serve as the basis for a determination not to comply with the request or demand.

(f) The request or demand should state that the requester will provide a copy of the employee's statement at the expense of the requester and that the requester will permit the FLRA to have a representative present during the employee's testimony.

9. Revise §2417.204 to read as follows:

§ 2417.204 Where to submit a request or demand.

(a) Requests or demands for official records, information, or testimony under this part must be served on the Office of the Solicitor at the following address: Office of the Solicitor, Federal Labor Relations Authority, 1400 K Street, NW., Suite 201, Washington, DC 20424-0001; telephone: (202) 218-7999; fax: (202) 343-1007; or email: solmail@flra.gov. The request or demand must be sent by mail, fax, or e-mail and clearly marked "Part 2417 Request for Testimony or Official Records in Legal Proceedings."

(b) A person requesting public FLRA information and non-public FLRA information under this part may submit a combined request for both to the Office of the Solicitor. If a requester decides to submit a combined request under this section, the FLRA will process the combined request under this part and not under part 2411 (the FLRA's Freedom of Information Act regulations).

10. Revise §2417.205 to read as follows:

§ 2417.205 Consideration of requests or demands.

(a) After receiving service of a request or a demand for official records, information, or testimony, the appropriate decision-maker will review the request and, in accordance with the provisions of this part, determine whether, or under what conditions, to authorize the employee to

testify on matters relating to official information and/or produce official records and information.

(b) Absent exigent circumstances, the appropriate decision-maker will issue a determination within 30 days from the date that it receives the request.

(c) The appropriate decision-maker may grant a waiver of any procedure described by this part where a waiver is considered necessary to promote a significant interest of the FLRA or the United States or for other good cause.

(d) The FLRA may certify that records are true copies in order to facilitate their use as evidence. If a requester seeks certification, the requester must request certified copies from the Office of the Solicitor at least 30 days before the date that they will be needed.

11. Revise §2417.206 to read as follows:

§ 2417.206 Final determination.

The Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate, makes the final determination on demands or requests to employees thereof for production of official records and information or testimony in civil litigation under this part. All final determinations are within the sole discretion of the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate. The appropriate decision-maker will notify the requester and, when appropriate, the court or other competent authority of the final determination, the reasons for the grant or denial of the request, and any conditions that may be imposed on the release of records or information, or on the testimony of an employee. This final determination exhausts administrative remedies for discovery of the information.

12. Amend §2417.207 by revising paragraphs (c) introductory text, (c)(2), and (d) to read as follows:

§ 2417.207 Restrictions that apply to testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate, the employee shall not:

(2) For a current employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the FLRA unless testimony is being given on behalf of the United States (see also 5 CFR 2635.805).

(d) The scheduling of an employee's testimony, including the amount of time that the employee will be made available for testimony, will be subject to the approval of the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate.

13. Revise §2417.208 to read as follows:

§ 2417.208 Restrictions that apply to released records.

(a) The Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate. In cases where protective orders or confidentiality agreements have already been executed, the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate so determines, original records may be presented for examination in response to a request, but they may not be presented as evidence or otherwise used in a manner by which they could lose their identity as official records, nor may they be marked or altered. In lieu of the original records, certified copies may be presented for evidentiary purposes.

14. Revise §2417.209 to read as follows:

§ 2417.209 Procedure when a decision is not made before the time that a response is required.

If a response to a demand or request is required before the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel can make the determination referred to in § 2417.206, the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the request is being reviewed, provide an estimate as to when a decision will be made, and seek a stay of the demand or request pending a final determination.

15. Revise §2417.210 to read as follows:

§ 2417.210 Procedure in the event of an adverse ruling.

If the court or other competent authority fails to stay a demand or request, the employee upon whom the demand or request is made, unless otherwise advised by the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate, will appear, if necessary, at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand or request, citing *United States ex rel. Touhy v. Ragen*, 340

U.S. 462 (1951).

Subpart C—Schedule of Fees

16. Revise §2417.301 to read as follows:

§ 2417.301 Fees.

(a) *Generally.* The Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate, may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs.

(b) *Fees for records.* Fees for producing records will include fees for searching, reviewing, and duplicating records; costs for employee time spent reviewing the request; and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. The FLRA will calculate and charge these fees, costs, and expenses as it charges like fees and costs arising from requests made pursuant to the Freedom of Information Act regulations in part 2411 of this chapter.

(c) *Witness fees.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear and on 28 U.S.C. 1821, as applicable. Such fees will include costs for time spent by the witness to prepare for testimony, to travel to the legal proceeding, and to attend the legal proceeding.

(d) *Payment of fees.* A requester must pay witness fees for current employees and any record certification fees by submitting to the Office of the Solicitor a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony of former employees, the requester must pay applicable fees directly to the former employee in

accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Waiver or reduction of fees.* The Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(f) *De minimis fees.* The FLRA will not assess fees if the total charge would be \$10.00 or less.

Subpart D—Penalties

17. Amend §2417.401 by revising paragraph (a) to read as follows:

§ 2417.401 Penalties.

(a) An employee who discloses official records or information, or who gives testimony relating to official information, except as expressly authorized by the Chairman of the FLRA, the General Counsel, or the Chairman of the Panel, as appropriate, or as ordered by a Federal court after the FLRA has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

Dated: September 1, 2016.

Carol Waller Pope,

Chairman.

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